83 - 1372
No. .....

IN THE

Supreme Court of the United States

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY C & H TRANSPORTATION CO., INC.

Ralph W. Pulley, Jr.
H.N. Cunningham III
102 Metropolitan Savings Tower
5944 Luther Lane
Dallas, Texas 75225
(214) 696-0055

Attorney for Petitioner

TO THE COURT:

C & H Transportation Co., Inc. (C & H or Petitioner) presents to the Court this Petition for Certiorari of the decision by the Fifth Circuit Court of Appeals favorable to Respondents Par Industries, Inc. (Par) and Jensen and Reynolds Construction Company (Jensen):

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the Trial Court by concluding that no basis has been shown for exercising jurisdiction in this case over Par in the Northern District of Texas, Dallas Division.

2. Whether the Court of Appeals erred in affirming the Trial Court by concluding that no basis has been shown for establishing in personam jurisdiction in this case over Jensen in the Northern District of Texas, Dallas Division.

3. Whether the action of the Court of Appeals is contra to this Court's decisions in *International Shoe Co. vs. Washington*, 36 U.S. 310, 316 (1945); *McGee vs. International Life Insurance Co.*, 355 U.S. 220 (1957); *Southern Pacific Transportation Co. vs. Commercial Metals Co.*, 102 S.Ct. 1822, 72 L.Ed. 123 and the Texas Supreme Court Decisions in *Hall vs. Helicoptoros Nacionales De Columbia S.A.*, 638 S.W.2d 870 (Tex. 1982), cert. granted, 103 Sup.Ct. 1270, 75 L.Ed.2d 493 (1983), and *U-Anchor Advertising, Inc. vs. Burt*, 553 S.W.2d 760 (Tex. 1977).

LIST OF INTERESTED PARTIES

The list as it relates to the Respondents is taken from the list submitted to the Court of Appeals:

C & H Transportation Co., Inc., Petitioner, is a Texas corporation. The parent corporation is The Tyler Corporation, a publicly held company. The other subsidiaries and affiliates of the Tyler Corporation are:

Tyler Corporation	Dallas, Texas
C & H Transportation Co., Inc.	Dallas, Texas
C & H Freightways	Phoenix, Ariz
C & H Forwarding Co., Inc.	Dallas, Texas
Tyler Pipe Industries, Inc. (Delaware)	Tyler, Texas
Tyler Pipe Industries of Texas, Inc.	Tyler, Texas
Wade, Inc.	Tyler, Texas
Tyler Pipe Industries, Inc. (Penn.)	Tyler, Texas
East Penn Foundary Co.	Macungie, Penn
Tyler Plastic Co.	Tyler, Texas
Swan Development Co.	Tyler, Texas
M. J. Harvey Foundation	Tyler, Texas
Atlas Powder Company	Dallas, Texas
Hall-Mark Electronics Corp.	Dallas, Texas
Kinepak, Inc.	Dallas, Texas
Oriard Powder Co., Inc.	Deer Park, Wash.
Tyler Tank Cars, Inc.	Dallas, Texas
East Kentucky Explosives, Inc.	Prestonsburg, KY
Atlas Slurry Company	Dallas, Texas
Tyler Leasing Company	Dallas, Texas
B&H Explosives	Coeburn, Virginia
West Kentucky Explosives	Madisonville, KY
Explo-Midwest, Inc.	Joplin, Missouri
Powder River Explosives	Billings, Montana
Bolt-Lock, Inc.	St. Louis Prk., MN

Hazard Explosives	Hazard, Kentucky
C & H Warehouse & Rigging, Inc.	Dallas, Texas
Atlas International, Inc.	Miami, FL
Star Export Services, Inc.	Pearlington, Miss.
Tyler Transportation Company	Charlotte, N.C.
Tyler Aviation, Inc.	Charlotte, N.C.
Thurston Motor Lines, Inc.	Charlotte, N.C.
Thurston Aviation, Inc.	Charlotte, N.C.
Phoenix Fittings	Tyler, Texas
Reliance Universal, Inc.	Louisville, Texas
Leeder Chemicals, Inc.	California
Reliance Brooks, Inc.	Kentucky
Reliance Intl. Sales Corp.	Kentucky
Reliance Powder Products, Inc.	Illinois
Reliance Universal, Inc.	California
Reliance Universal, Inc.	Illinois
Reliance Universal, Inc.	New Jersey
Reliance Universal, Inc.	North Carolina
Reliance Universal, Inc.	Oregon
Reliance Universal, Inc.	Texas
Reliance Universal, Inc.	Virginia
Reliance Universal, Inc. of Ohio	Ohio
Reliance Universal, Inc. (B.C.) Ltd.	Canada
Reliance Universal, Inc.	Canada
Reliance Universal of Louisiana	Louisiana
Reliance Universal of Puerto Rico, Inc.	Kentucky
Reliance Universal, N. V. of Belgium	Belgium
Reliance Western Hemisphere, Inc.	Kentucky

To Counsel's knowledge, Jensen and Reynolds Construction Company has no parent or affiliate company.

Par Industries, Inc. has a parent company, Armco, Inc., a publicly-held company. Armco has the following affiliates which

are not wholly owned by Armco to the best of Counsel's knowledge:

Accerex	Peru
Aceros Del Sur S.A.	Peru
Allied Investment Corporation	Delaware
The American Life Insurance Company of New York	New York
Armco-Bundy Ror AB	Sweden
Armco Industrial S.A.	Ecuador
Armco Industries (Nigeria) Ltd.	Nigeria
Armco Jennings Finance Limited	Australia
Armco Marstell Alloy Corporation	Philippines
Armco Moly-Cop S.p.A.	Italy
Armco Peruana S.A.	Peru
Armco Robson (Pty.) Limited	South Africa
Armco Thyssen GmbH	Germany
Australian Steel & Mining Corporation Pty. Ltd.	Australia
P. T. Bakrie – Armco	Indonesia
Bienes de Capital Imsa, S.A. de C.V.	Mexico
Big Three Lincoln (U.K.) Limited	Scotland
Black River Lime Company	Ohio
Court Galvanizing, Inc.	California
Court Galvanizing Limited	Canada
D.T.F.S.I.C.A.	Venezuela
Equipetrol Administracao E Participacoes Ltd.	Brazil
Equipetrol, S.A.	Brazil
Equipetrol Norte Industria E Commercio Ltd.	Brazil

Falconbridge Dominicana C. por A.	Dominican Republic
Herman Smith HITCO Ltd.	United Kingdom
IMSA National, S.A. de C.V.	Mexico
Industrias National Supply C.A.	Venezuela
Intercontinental Insurance Agencies, Inc.	Puerto Rico
Iron Ore Company of Canada	Delaware
Mansion Management Services Limited	Bermuda
Marine Mineral Industries, Inc.	Philippines
Metaltubos C.A.	Venezuela
Middletown Enterprises, Inc.	Ohio
Minera Cerro de Plata, S.A. de C.V.	Mexico
Northern Land Company	Minnesota
Nuovi Tubi Brindisi SpA	Italy
Obras Civiles e Industrias C.A.	Ecuador
Oregon Metallurgical Corporation	Oregon
Productos Metalicos Armco S.A.	Ecuador
Prolansa	Peru
Reserve Mining Company	Minnesota
Wilbur Smith and Associates Limited	Canada
State Surety Company	Iowa
Technocargo-Transportes Especializados Ltd.	Brazil
Torcad Limited	Canada

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	vii
STATEMENT OF GROUNDS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Page

CASES:

Hall vs. Helicopteros Nacionales De Columbia S.A.
638 S.W. 2d 870 (Tex. 1982), cert. granted
103 S.Ct. 1270, 75 L.Ed.2d 493 (1983) 6,8,11

International Shoe Co. vs. Washington
36 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95
(1945) 7,9,11

Jetco Electronic Industries, Inc. vs. Gardiner
473 F.2d 1228, 1231 (5th Cir. 1973) 2

Kulko vs. California Superior Court
[436 U.S.] at 92, 56 L.Ed.2d 132, 98 S.Ct. 1690 5,8

Louisville & N.R.R. vs. Central Iron & Coal Co.
265 U.S. 59, 70, 44 S.Ct. 441, 444, 68 L.Ed. 900
(1924) 6

McGee vs. International Life Insurance Co.
355 U.S. 220 (1957) 5,8,9,10,11

Milliken vs. Meyer
311 U.S. 457, 463 61 S.Ct. 339, 85 L.Ed. 278 (1940) 7

Navarro vs. Sedco, Inc.
449 F.Supp. 1355 (1978) 6

O'Brien vs. Lanpar Company
399 S.W.2d (Tex. 1966) 7,9,11

Prejean vs. Sonatrach, Inc.
652 F.2d 1260 (5th Cir. 1981) 6

Shafer vs. Heitner
433 U.S. 186, 211 n. 37 53 L.Ed. 2d 683, 97,
S.Ct. 2569 (1977) 8

TABLE OF AUTHORITIES (Continued)

Page

Southern Pacific Transportation Co. vs. Commercial Metals Co.
102 S.Ct. 1822 72 L.Ed. 123 reversing 642 F.2d 263 6

U-Anchor Advertising Inc. vs. Burt
553 S.W.2d 760 (Tex. 1977) 5,7,11

World-Wide Volkswagon Corp. vs. Woodson
444 U.S. 286 (1980) 8,10,11

STATUTES:

49 U.S.C. §10743 3

49 U.S.C. §10761 3

49 U.S.C. §10762 3

28 U.S.C. §1337 2

28 U.S.C. §1254(1) 2

Vernon's Ann. Tex. Civ. Stat. art 2031b 9,10

UNITED STATES CONSTITUTION:

U.S.C.A. Const. Amend. 14 2

No. .....

IN THE

Supreme Court of the United States

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY C & H TRANSPORTATION CO., INC.

STATEMENT OF GROUNDS FOR JURISDICTION

The date of the decree sought to be reviewed by Petitioner was November 21, 1983. This is also the time the decision was entered by the court.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by Writ of Certiorari is 28 U.S.C. §1254(1) and Rule 17(a) and (c), Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These include 49 U.S.C. §§10743, 10761 and 10762; Vernon's Ann. Texas Civ. St. art. 2031b, §4; and U.S.C.A. Const. Amend. 14, 28 U.S.C. §1337, 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This civil action was initially filed by C & H under the provisions of Title 28 U.S.C. §1337 which provides the District Courts have original jurisdiction of any Civil Action arising under any act of Congress relating to commerce. C & H as a regulated motor carrier, performed transportation services in interstate commerce under tariffs filed with the Interstate Commerce Commission. After an adverse order by the United States District Court dismissing the case without prejudice upon motions by Respondents, Petitioner appealed the lower Court's order to the Fifth Circuit Court of Appeals. Because there was a complete dismissal and termination of the case, the trial court order was final and appealable. *Jetco Electronics Industries, Inc. vs. Gardiner,* 473 F.2d 1228, 1231 (5th Cir. 1973).

C & H originally instituted this suit seeking payment of freight charges due from Par as consignor and Jensen as consignee for regulated transportation services related to the transporting by C & H of products identified on the Bill of Lading contracts and related freight bills as various Crane Parts, i.e. a Boom Section, a Spreader Bar, Cat Walks, Cable Guide, etc. Shipments moved

from facilities of Par at New Iberia, Louisiana consigned to Foss Alaska Line c/o Jensen, Seattle, Washington. The balance of the charges due to C & H are sought in the total sum of $30,191.73. The freight bills issued are attached to the Complaint. (TR 1-34).

Par filed a Motion to Dismiss and/or Motion for Summary Judgment asserting lack of jurisdiction and/or improper venue (TR 37-53). C & H filed an Affidavit in opposition with copies of its dispatch records for the shipments attached. (TR 54-68).

Jensen filed a Motion to Dismiss or, alternatively, to quash the return of service of summons with a Brief in support. (TR 69-81). C & H filed an Affidavit in opposition to the Jensen Motion (TR 82-97).

The Trial Court filed an Order on May 24, 1983, granting the Motions to Dismiss by Par and Jensen and dismissing the case without prejudice. (TR 96-99). C & H perfected its Appeal from this Order to the Fifth Court of Appeals. On November 21, 1983, the Fifth Court of Appeals affirmed.

C & H is a motor common carrier regulated by the Interstate Commerce Commission and provides transportation service to the shipping public charging rates authorized under published tariffs. C & H is a Texas corporation and maintains its principal office and place of business in Dallas County, Texas. The action arises under the Revised Interstate Commerce Act, Title 49, U.S.C.A. §10743, §10761 and §10762.

Par is a Louisiana corporation with its principal place of business in New Iberia, Louisiana. (TR 41). Par is the consignor named on each Bill of Lading and the related freight bills issued for the transportation services provided by C & H. (TR 6-34). The shipments were loaded by Par personnel with Par equipment

at Par's facilities in New Iberia. (TR 56). Par has no office or place of business in Texas. (TR 41). C & H was lead to believe at all times that Par was the consignor of the shipments. (TR 56).

Jensen is a California corporation where its principal place of business is located. It has no office in Texas. (TR 93). David Jensen is apparently an officer in Jensen and Manitou Equipment Corp. The Bills of Lading and related freight bills named the consignee as Foss Alaska in care of Jensen. In June, 1981, David Jensen contacted the C & H terminal in Tacoma, Washington regarding transporting the Crane from Par's facilities at New Iberia to Jensen at the Foss Alaska Lines facility in Seattle. Jolly, the C & H terminal manager at Tacoma, and Jensen contacted David Wilson, C & H manager-Heavy Haul Division at Dallas to discuss the shipment. Jolly and Wilson contacted the C & H Harvey, Louisiana Terminal for the dispatch, and a Dispatch Order was issued. (TR 84, 88). At all times pertinent herein, C & H was lead to believe that Jensen was the consignee of the shipments. Foss Alaska Line was represented to be the agent of Jensen. Foss receipted for the shipments at Seattle as agent for Jensen. C & H understands that Foss is a Steamship Company hired by Jensen to transport the Crane parts from Seattle to Alaska. (TR 84). Pursuant to billing instructions given C & H by David Jensen, the freight charges were to be billed to a third party, Manitou Equipment Corp., Seattle, Washington. In August, 1981, C & H received a letter from David Jensen on the letterhead of Manitou Equipment Corp. (TR 90). David Jensen signed as president of Manitou Equipment Corp. for Jensen. The letter protested the freight bill for transporting the Crane claiming an original quote for the service in the sum of $21,556 for nine (9) trucks while the freight bills had a total of "$42,895.72". It was felt the charge was "exorbitant". After prolonged collection efforts in January, 1982, C & H received a check by mail from Jensen at C & H's Dallas, Texas, facility in partial payment of the freight charges.

The check is of record. (TR 97) The check is payable to C & H Transportation Co., P.O. Box 270535, Dallas, Texas 75227 and is issued for the sum of $30,000. The check was mailed to the address stated on the freight bills by C & H as the place where payment of the freight bills was to be made. (TR 30-34). Jensen claims that Manitou contracted with Transmaster, Inc., a freight forwarder in Seattle, Washington for shipment of the goods from New Iberia to Foss Alaska Lines in Seattle. (TR 94). Jensen claims a contract was made with Transmaster for a specific price not to exceed $30,000 in shipping costs. (TR 94). Transmaster does not appear on any shipping documents of C & H and was not mentioned as a factor until the Affidavit filed by Jensen in support of its motion. C & H had no dealings with Transmaster. (TR 85). The contract for transportation was performed in part in the Northern District of Texas in that C & H transported the goods from New Iberia through the Northern District of Texas to Seattle (TR 85) and partial payment of the freight charges was made by check issued by Jensen payable to C & H at Dallas, and mailed to and received by C & H in Dallas County, Texas in the Northern District of Texas.

ARGUMENT

The U.S. Supreme Court cases of *McGee vs. International Life Insurance Co.*, 355 U.S. 220 (1957) and *Kulko vs. California Superior Court*, [436 U.S.] at 92, 56 L.Ed.2d 132, 98 S.Ct. 1690, contain important, applicable principals, but were not cited by the Court of Appeals. The enlarged interpretation and application of Article 2031(b) by the Texas Supreme Court in *U-Anchor Advertising Inc. vs. Burt*, 553 S.W.2d 760 (Tex. 1977) and related decisions greatly expanded the Texas Long-Arm Statute. The principals of such cases were not properly applied by the Fifth Court of Appeals to the situation presented in the case at bar.

If the reasoning and decision of the Court of Appeals affirming the Trial Court is correct, then C & H must bring a lawsuit in Louisiana against the consignor and a lawsuit in California or Washington against the consignee. Yet, the interstate judicial system has an interest in obtaining the most efficient resolution of controversies.

Respondent Par Industries, Inc. is the consignor shown on the C & H bill of lading contract. The shipment was loaded on C & H trucks by Par equipment, at a Par facility and by Par employees. Par could have protected itself as consignor by signing Section 7 of the bill of lading. This was not done. *Southern Pacific Transport Co. vs. Commercial Metals Co.*, 102 S.Ct. 1822, 72 L.Ed. 123 reversing 642 F.2d 263.

Respondent Jensen & Reynolds Construction Company was consignee and made a partial payment of the freight charges to C & H. The consignee is also liable for the tariff charges for the C & H services, *Louisville & N.R.R vs. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S.Ct. 441, 444, 68 L.Ed. 900 (1924).

Par, as consignor, and Jensen, as consignee, are responsible, jointly and severally for the payment of the freight charges to C & H. This virtual absolute liability is important to emphasize particularly with respect to C & H's interest in effective and convenient relief in the forum of its choice.

The reach sanctioned by the State Long-Arm Statute is a question of Texas Law, *Prejean vs. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). However, the interpretation of the due process clause as applied to the service of process under the Texas Long-Arm Statute is not binding on this Court, *Navarro vs. Sedco, Inc.*, 449 F.Supp. 1355 (1978).

The Texas Supreme Court reviewed its interpretation and application of Art. 2031(b), VACS, and the cases relating to that

Statute in *Hall vs. Helicopteros Nacionales de Colombia S.A.*, 638 S.W.2d 870(Tex. 1982), cert. granted, 103S.Ct. 1270, 75 L.Ed.2d 493 (1983). The Texas Court withdrew an earlier opinion 25 Tex.Sup.Ct. Journ. 190 (1982). The Court reaffirmed its opinion in *U-Anchor Advertising, Inc. vs. Burt*, supra, in which the Court held that Art. 2013b VACS reaches as far as the Federal Constitutional requirements of due process will permit. This permits the Courts " ... to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business' ".

The Texas Court also reaffirmed its approval in *U-Anchor* of the "three-prong" test set out in *O'Brien vs. Lanpar Company*, 399 S.W.2d 340 (Tex. 1966). That three-prong test is:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) The cause of action must arise from or be connected with, such act or transaction; and
>
> (3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice; consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

While the Texas Court recognized *International Shoe Co. vs. Washington*, 326 U.S. 310, 316, 66 S.Ct 154, 90 L.Ed. 95 (1945), quoting *Milliken vs. Meyer*, 311 U.S. 457, 463 61 S.Ct. 339, 85 L.Ed. 278 (1940), the Texas Court concluded that the U.S. Supreme Court had broadened the parameters of due process to

"...allow inquiry into other 'relevant factors,' " citing *World-Wide Volkswagen Corp. vs. Woodson,* 444 U.S. 286 (1980).

Citing *International Shoe,* supra, this Court in commenting about the burden of a non-resident Defendant in *World-Wide* at 292, stated:

> "... the burden on defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see MCGEE vs. INTERNATIONAL LIFE INS. CO. 355, U.S. 220, 223, 2 L.Ed.223, 78 S.Ct. 199 (1957); the Plaintiff's interest in obtaining convenient and effective relief, see *KULKO vs. CALIFORNIA SUPERIOR COURT,* [436 U.S.] at 92, 56 L.Ed.2d 132, 98 S.Ct. 1690, at least when that interest is not adequately protected by the Plaintiff's power to choose the forum, c.f. *Shafer vs. Heitner,* 43 U.S. 186, 211, n. 37, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *KULKO vs. CALIFORNIA SUPERIOR COURT,* supra, at 93, 98, 56 L.Ed.2d 132, 98 S.Ct. 1690."

These conclusions in *World-Wide* make provision to look at the State's interest in adjudicating this dispute between C & H and Respondents and C & H's interest in effective and convenient relief. The Texas Court in *Hall* made the same observation in finding that Texas had an interest in obtaining the most efficient resolution of controversies and that *Hall* had a genuine interest and desire in obtaining convenient and effective relief.

The Texas Court also made reference to the U.S. Supreme Court decision in *McGee vs. International Life Insurance Co.*, 355 U.S. 220 (1957). In that case, this Court recognized there might be some inconvenience to the Defendants, but based on the situation, due process would not be offended.

In affirming the motions of respondents in this case, the Court of Appeals failed to properly apply pertinent considerations. Such include the complete transaction which involved partial consummation of the contract by Jensen in the payment of a portion of the freight charges to C & H at its general office in Dallas in accordance with the freight bills issued from Dallas by C & H. Art. 2031b, VTCS, as recognized by the Texas Supreme Court in the *Hall* decision, provides that the non-resident must have a contract with a Texas resident performable in part by either party in Texas to constitute "doing business" in the State. The transaction was finally negotiated over the telephone by a representative of Jensen and a C & H representative in Dallas. C & H picked up the load from Par at its facilities in New Iberia, Louisiana, transported the shipment through the Northern District of Texas, delivered it in Seattle, Washington, to the agent of Jensen as consignee, and C & H received partial payment of the freight charges at its Dallas office by a Jensen check payable to C & H at its Dallas address and received in Dallas.

Turning to the *O'Brien* case, supra, and the three-prong test, and contrary to the Court of Appeals interpretation and application of same, it is evident the transaction was partially consummated in Texas as the forum State; the cause of action did arise from and was connected with the transaction; and the assumption of jurisdiction by Texas as the forum State does not offend traditional notions of fair play and substantial justice based on the elements given consideration in part (3) of the test.

In addition, this Supreme Court has broadened the parameters of due process to permit inquiry into other "relevant factors".

Texas is certainly a reasonable location to require Respondents to defend the particular suit. C & H is a Texas corporation and has its general office in Dallas which creates an interest for Texas in adjudicating the dispute. C & H has a definite interest in obtaining convenient and effective relief, particularly considering the nature of the suit and the absolute liability by Respondents as consignor and consignee. There is nothing reasonable or fair about requiring C & H, under the conditions existing here, to bring a law suit in Louisiana and a law suit in California or Washington resulting in separate litigation and a very inefficient resolution of the controversy. These are relevant factors under the *World-Wide* and *McGee* decisions, supra.

In the *McGee* case, McGee, a California resident, sued a Texas insurance company as a beneficiary under a life insurance policy. The insurance company's only contact had been its mailing of the policy to the State, and its receipt of premium payments from the decedent. The U.S. Supreme Court addressed the relative convenience of the parties and based its decision permitting the maintenance of the suit in California on the State's interest in providing effective redress, and the fact that an individual claimant could not overcome the difficulties of maintaining an action in a foreign forum. The Court also recognized the inconvenience caused to the Defendant, but based on the contacts of Defendant, due process was not offended.

It certainly cannot be said that this transaction between C & H and Respondents is totally unrelated to Texas. With all of the factors here involved, including the part payment of the freight charged by Jensen, Texas is the proper forum. Service was proper under Art. 2031b of the Texas Statute and due process is not offended by requiring Respondents to defend this action in the Northern District of Texas at Dallas. There is much more involved here than just the goods being transported through Texas from origin to destination. The fact is that in implementing the contract, this was done by C & H. With the other contacts, related specifically to this transaction, the proper and convenient forum is in the Northern District of Texas at Dallas. Par is an

integral part of the transaction and is a part of the Bill of Lading contract as consignor. The liability of the consignor and consignee in the situation presented here by C & H is joint and several.

The Court of Appeals found that any nexus requirement in *Hall vs. Helicopteros Nacionales,* supra, is fully satisfied. However, the Court erroneously failed to conclude that the telephone call between C & H and Jensen initially arranging the transaction, the transporting of the commodities through the Northern District of Texas, the mailing of a check by Jensen in partial payment to C & H at Dallas, Texas, as specified in the shipping document, and the receipt of the check by C & H at Dallas, was not sufficient to satisfy the first and third requirements of the three-pronged test stated by the Texas Supreme Court.

Because the basis for the litigation involves interstate commerce, the collection of freight charges promulgated by interstate tariffs, and the factual elements properly point to the Northern District of Texas as a proper place for this litigation involving an interstate commercial transaction, this petition for certiorari should be granted. The Court of Appeals decision is contrary to the decision of this Court in *McGee* and in *International Shoe,* and the Texas Supreme Court in *Hall, U-Anchor, O'Brien,* and the relevant language of this Court in *World-Wide Volkswagen Corp.*

Respectfully submitted,

Ralph W. Pulley, Jr.
H.N. Cunningham III
102 Metropolitan Savings Tower
5944 Luther Lane,
Dallas, TX 75225
(214) 696-0055

Ralph W. Pulley, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Writ of Certiorari has been served on Counsel for Respondents Barry J. Brooks and David M. Taylor by placing a copy of same in the United States Mail, postage prepaid, on this 16 day of February, 1984, addressed to Brooks & Brooks, 8300 Douglas, Suite 800, Dallas, Texas 75225 and 2001 Bryan Tower, Suite 1000, Dallas, Texas 75201, respectively.

Ralph W. Pulley, Jr.

A. Decision of Fifth Circuit Court Appeals.

B. Order United States District Court Northern District of Texas.

C. List of Constitutional Provisions and Statutes.

APPENDIX

C & H TRANSPORTATION CO., INC., Plaintiff-Appellant,

v.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY and Par Industries, Inc., Defendants-Appellees.

No. 83–1425
Summary Calendar.

United States Court of Appeals
Fifth Circuit.

Nov. 21, 1983.

Motor common carrier brought action for payment of freight charges for transportation of crane parts. The United States District Court for the Northern District of Texas, A. Joe Fish, J., granted motions to dismiss defendant Louisiana consignor and defendant California corporation which had contracted to rent crane parts, and carrier appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) District Court lacked statutory jurisdiction over consignor, and (2) it could not be

said that corporation purposely availed itself of privilege of conducting business within Texas or that it invoked benefits and protections of Texas law.

Affirmed.

1. Federal Courts ⇐701

In motor common carrier's action for payment of freight charges for transportation services it performed, grant by United States District Court for the Northern District of Texas of nonresident defendant consignor's motion to dismiss on basis of lack of statutory jurisdiction would be affirmed absent record evidence that consignor entered into contract with carrier. Vernon's Ann.Texas Civ.St. art. 2031b, § 4.

2. Constitutional Law ⇐305(6)

In motor common carrier's action for payment of freight charges for transportation of crane parts, exercise of jurisdiction by Texas over California corporation which contracted to lease crane parts would not comport with basic due process require-

ments of United States Constitution where corporation's only contacts with Texas consisted of conference telephone call, movement of parts through Texas and mailing of check to carrier in Texas. U.S.C.A. Const.Amend. 14.

3. Federal Courts ⇐71

For court to exercise jurisdiction over nonresident defendant, defendant must have some minimum contact with state resulting from affirmative act or acts on its part and it must not be unfair or unreasonable to require nonresident defendant to defend suit in forum. U.S.C.A. Const. Amend. 14.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, POLITZ, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiff C & H Transportation, Inc. (C & H) appeals the district court's grant of the

motions to dismiss of defendants Par Industries, Inc. (Par) and Jensen & Reynolds Construction Co. (Jensen & Reynolds) on the basis of lack of in personam jurisdiction. This Court affirms the district court's grant of the motions to dismiss of both defendants.

Plaintiff C & H, a motor common carrier, brought this action under the Revised Interstate Commerce Act,[1] seeking payment of freight charges for transportation services it performed. These services involved movement of crane parts from New Iberia, Louisiana, to Seattle, Washington. C & H is a Texas corporation with its principal office and place of business in Dallas County, Texas. Defendant Par is a Louisiana corporation with its principal place of business in New Iberia, Louisiana. Par neither has an office nor conducts business in the State of Texas. Par was the consignor that loaded the equipment at its facilities in New Iberia. Defendant Jensen & Reynolds is a California corporation with its principal place of business in California.

---

1. 49 U.S.C. §§ 10743, 10761 & 10762.

Jensen & Reynolds has no office in Texas, has no license to do business in Texas, and has not conducted business in Texas.

Jensen & Reynolds contracted with Manitou Equipment Corp. (Manitou) in the State of Washington to lease crane parts for use in construction jobs. At that time, Manitou's crane parts were in the possession of defendant Par in New Iberia, Louisiana. Jensen & Reynolds claims that Manitou contracted with Transmaster, Inc., a freight forwarder in Seattle, Washington, to ship Manitou's equipment to Foss Alaska Lines (Foss) in Seattle.[2] According to David Jensen, president of Jensen & Reynolds, Manitou, after obtaining Jensen's approval, contracted with Transmaster for a specific price not to exceed $30,000 in shipping costs. C & H denies any knowledge of such a contract as well as any dealings

---

2. C & H claims that it was led to believe that Jensen & Reynolds was the consignee of the shipment and that Foss was Jensen & Reynolds' agent. Apparently, however, Foss was the steamship company hired by Jensen & Reynolds to transport the crane parts from Seattle to Alaska.

between itself and Transmaster. C & H notes that Transmaster did not appear on any of its shipping documents.

Some period of time after Manitou allegedly contracted with Transmaster, David Jensen called Manitou to inquire where his leased equipment was. According to Jensen, Manitou put him in touch with Transmaster who in turn put him in touch with C & H's terminal manager in Tacoma, Washington. A three-way conference call then took place involving C & H's offices in Washington, C & H's offices in Dallas, and Jensen.[3] In addition to informing C & H where the equipment was to be sent and to whom it was to be delivered, Jensen told C & H to send the freight bill to Manitou.

C & H transported the equipment from New Iberia to Seattle, Washington via northern Texas. After receiving C & H's bill from Manitou in August 1981, Jensen

---

3. Jensen claims that it was his understanding that C & H had assumed Transmaster's obligations to ship the equipment.

complained to Manitou about the charges which exceeded $30,000.[4] According to Jensen, Manitou told him to send a written complaint to C & H. Jensen then wrote C & H a letter protesting the freight bill on Manitou stationery and signed "David Jensen, President." Although Jensen meant to sign as president of Jensen & Reynolds, C & H understood that Jensen had signed in the capacity of president of Manitou. In January 1982, Jensen & Reynolds mailed a check for $30,000 to C & H at its offices in Dallas, Texas.

[1] Plaintiff alleges jurisdiction over both defendants pursuant to the Texas "long-arm" statute, Article 2031b(4), which provides, in pertinent part, that any foreign corporation "shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State ...." The district court granted Par's motion to dismiss on the basis of a lack of statutory jurisdiction. The grant of the motion to

4. The freight bills totaled $42,895.72.

dismiss as to Par must be affirmed. There is no record evidence that Par entered into a contract with C & H. Indeed, C & H makes no claim that it contracted with Par. The district court was therefore correct in granting Par's motion to dismiss for C & H's failure to satisfy the requirements of Article 2031b(4).

[2, 3] As for Jensen & Reynolds, the district court assumed compliance with the statutory requirements [5] but granted the motion to dismiss on the constitutional basis of a lack of "minimum contacts" between Jensen & Reynolds and the State of Texas. The court found that it would offend the traditional notions of fair play and substantial justice for Texas to exercise jurisdiction over Jensen & Reynolds on the basis of no more than (1) a three-way conference call involving Jensen in the State of Washington, C & H in the State of Washington, and C & H in Texas concerning details of shipping goods and (2) movement of the goods through the State of Texas.

---

5. The court credited plaintiff's contention that a contract was formed between C & H and Jensen & Reynolds during the course of the three-way conference call.

The court further found that C & H's choice of a route through Texas was not an act which was purposefully conducted by Jensen & Reynolds in Texas. The court therefore found that the first and third prongs of the *O'Brien* test [6] had not been satisfied.

We agree with the district court that the exercise of jurisdiction over Jensen & Reynolds by the State of Texas does not

---

6. The three-prong test to determine whether constitutional due process requirements have been met when a state exercises jurisdiction over the person of a defendant was set out in *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966). The test is as follows:

(1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;

(2) the cause of action must arise from, or be connected with, such act or transaction; and

(3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice; consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

comport with the basic due process requirements of the United States Constitution. For purposes of clarity, this Court notes that although the district court spoke in terms of a three-pronged test for meeting the requirements of constitutional due process, the constitutional test is only two-pronged. The defendant must have some minimum contacts with the state resulting from an affirmative act or acts on its part, and it must not be unfair or unreasonable to require the nonresident defendant to defend the suit in the forum. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir.1983); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980). Since the instant case does not involve the second prong of the *O'Brien* test (the requirement of a nexus between the cause of action and the defendant's contacts with the state),[7] the district court's reference to the test as

---

7. Here, any nexus requirement is fully satisfied—C & H's cause of action for unpaid freight charges arises from Jensen & Reynolds contacts with Texas (phone call, movement of its goods through Texas, and mailing of a check).

three-pronged in no way impairs its analysis.[8] It is beyond question that at least one prong—the affirmative act prong—is not satisfied in the instant case. In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958) the Supreme Court stated: "[I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

---

8. Although in *Hall v. Helicopteros Nacionales*, 638 S.W.2d 870 (Tex.1982), *cert. granted*, — U.S. —, 103 S.Ct. 1270, 75 L.Ed.2d 493 (1983), the Texas Supreme Court extended the reach of article 2031b to the limits of due process, language in the opinion indicates that the second prong, the nexus requirement, is constitutionally required in cases where the nonresident defendant only maintained single or few contacts with the forum:

> The second prong is useful in any fact situation in which a jurisdiction question exists; and is a necessary requirement where the nonresident defendant only maintained single or few contacts with the forum. However, the second prong is unnecessary when the nonresident defendant's presence in the forum through numerous contacts is of such a nature, as in this case, so as to satisfy the demands of the ultimate test of due process.

Here, it cannot be said that Jensen & Reynolds purposely availed itself of the privilege of conducting business within Texas or that it invoked the benefits and protections of Texas law. Jensen & Reynolds' only contacts with Texas consisted of the three-way conference call (with Jensen in the State of Washington), the movement of the goods it had leased through Texas on their way to Washington, and the sending by mail of a $30,000 check to C & H in Dallas. As for the conference call involving C & H's Dallas offices, the call was

---

Accordingly through the statutory authority of Art. 2031b Tex.Rev.Civ.Stat.Ann. there remains the single inquiry: is the exercise of jurisdiction consistent with the requirements of due process of law under the United States Constitution?

Hall, 638 S.W.2d at 872. [Certiorari was granted in *Hall* on questions involving the constitutionality of exercising jurisdiction over the defendant in that case given the extent of its contacts with Texas and the fact that plaintiff's cause of action did not arise from these contacts. 51 U.S.L.W. 3636 (U.S. March 1, 1983) (No. 82-1127). Even if the Supreme Court's decision in *Hall* were to institute a constitutional nexus requirement in cases where the defendant's contacts with the forum are not substantial, the decision would not affect the result in the instant case.]

apparently initiated by the C & H terminal manager in Tacoma, even though it was Jensen who had contacted C & H in Tacoma to inquire about the equipment. Even attributing the initiative for this call to Jensen & Reynolds, this sole use of interstate commerce is "insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws." *See Hydrokinetics*, 700 F.2d at 1029 (extensive communications between Texas and Alaska in the development of the contract insufficient to count as purposeful activity). Secondly, the routing of the equipment through Texas was undoubtedly not the result of any affirmative act by Jensen & Reynolds—C & H, as carrier, was responsible for the choice of route. Performance—delivery of the equipment—was not to occur in Texas, but in the State of Washington. *Compare Hydrokinetics*, 700 F.2d at 1029 & 1030 [distinguishing the case at bar from *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974) in that the contract in *Cousteau* required delivery of the product in Texas]. Finally, the fact that Jensen &

Reynolds mailed a payment check to C & H in Texas can hardly be termed significant in terms of a purposeful availment of the benefits of the forum state. In *Hydrokinetics*, 700 F.2d at 1029, this Court did not "weigh heavily" the fact that the defendant might have mailed a check to the forum state in payment for the goods received. The significant factor here, as in *Hydrokinetics*, is that only a single, isolated transaction [9]—Jensen & Reynolds' sole contact with the forum state—was involved. In sum, the totality of Jensen & Reynolds' contacts with Texas do not support an inference of purposeful availment. The mere use of interstate commerce on a single occasion involving the forum, the fortuitous routing of equipment through the forum on the way to its destination in Washington, and the mailing of a payment check to the forum do not constitute the minimum contacts necessary to constitutionally

---

9. The record does not reveal that Jensen & Reynolds had other contacts with Texas, nor does plaintiff contend that Jensen & Reynolds regularly seeks the services of Texas residents.

exercise jurisdiction over Jensen & Reynolds. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C & H TRANSPORTATION CO., INC. *Plaintiff,* vs. JENSEN AND REYNOLDS CONSTRUCTION COMPANY and PAR INDUSTRIES, INC., *Defendants.*	CIVIL ACTION NO. CA 3-82-1336-G

ORDER

The motions to dismiss of defendants Jensen and Reynolds Construction Company and Par Industries, Inc. are GRANTED on the ground that the Court's jurisdiction over these non-resident defendants has not been established.

When this Court's jurisdiction is challenged by a defendant, the burden is on plaintiff to establish jurisdiction. Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1138 (5th Cir. 1980). Plaintiff asserts jurisdiction pursuant to the Texas long-arm statute, article 2031b (4), which provides, in pertinent part, that "any foreign corporation ..... shall be deemed doing business in this State by entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State ..... ." According to plaintiff, jurisdiction exists in this case (1) because a representative of plaintiff conversed with a representative of Jensen on long distance telephone regarding the shipment in question, the conversation amounting to formation of a contract between the

parties, and (2) because the shipment in question was transported through Texas, thus constituting part performance by plaintiff in this state.

Plaintiff has never contended, however, that it entered into a contract in Texas with defendant Par Industries, Inc. Consequently, the Court need not decide whether exercising jurisdiction over defendant Par would exceed constitutional bounds, because the first step in resolving a jurisdictional challenge under the long-arm statute is to determine whether requirements of the statute have been satisfied. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1264 (5th Cir. 1981). If the requirements of article 2031b have not been met, the Court must dismiss the case without further inquiry. The Court concludes that no basis has been shown for exercising jurisdiction in this case over defendant Par.

On the other hand, the Court must pursue the inquiry mentioned above to determine whether exercise of jurisdiction over defendant Jensen is constitutional. For Texas to constitutionally maintain jurisdiction over this non-resident defendant, Jensen must have had "minimum contacts" with the state. A three-prong test involving the defendant's contacts with Texas must be satisfied before an exercise of jurisdiction is proper:

(1) The non-resident defendant must purposefully do some act or consummate some transaction in the forum state;

(2) The cause of action must arise from, or be connected with, such act or transaction; and

(3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and

> extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

U-Anchor Advertising, Inc. v. Burt, 553 S.W. 2d 760, 762 (Tex. 1977), *cert. denied,* 434 U.S. 1063 (1978); O'Brien v. Lanpar Company, 399 S.W. 2d 340, 342 (Tex. 1966).

Defendant Jensen's two contacts with the State of Texas do not rise to the level of the required "minimum contacts." An exercise of jurisdiction over a non-resident whose only contacts with the state of Texas consisted of (1) a three-way conference call (among Jensen in Washington state, C & H in Texas, and the C & H terminal manager in Washington state) concerning details of shipping the goods, and (2) movement of the goods through the state of Texas, does not satisfy the three-prong test of *O'Brien.* Given the extensive use of interstate telephone communication in today's business world, it is not reasonable for a party to be subjected to the jurisdiction of whatever foreign state or states he may happen to talk with by telephone. Such an idea offends traditional notions of justice and fair play. For much the same reason, a state should not exercise jurisdiction over a party merely because goods with which he is somehow connected must pass through the state to reach their destination. For jurisdictional purposes, the routing of such goods through Texas by someone other than defendant was purely fortuitous and not a purposefully conducted activity. *See* U-Anchor Advertising, Inc. v. Burt, *supra,* at 763. Were this Court to hold that these two contacts are sufficient to satisfy due process, any person, individual or corporate, could be subject to the jurisdiction of virtually every state in the union. The Court declines to adopt such an expansive interpretation of due process. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-298 (1980).

Because plaintiff has not discharged its burden of establishing in personam jurisdiction over these non-resident defendants, their motions to dismiss are GRANTED, and this case is dismissed without prejudice.

May 24, 1983.

A. JOE FISH
United States District Judge

APPENDIX C

28 USC § 1337

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

49 USC § 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

49 USC § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service or another device.

49 USC § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carrier shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

USC, CONSTITUTION AMENDMENT XIV

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Ann. Civ. Stat., Art. 2031b

Sec. 4 For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or nonresident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

28 USC § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

NO. 83-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR DAMAGES BY PAR INDUSTRIES, INC.

Barry J. Brooks
Frank C. Brooks
BROOKS & BROOKS
8300 Douglas, Suite 800
Dallas, Texas 75225
(214) 373-9175
Attorneys for Respondent
Par Industries, Inc.

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

ARGUMENT 2
No Contacts 3
No Contract 4

REQUEST FOR DAMAGES 6

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases **Page**

Familia De Boom v. Arosa Mercantile, S.A.,
629 F. 2d 1134 (5th Cir. 1980).....2

Insurance Corp. of Ireland, Ltd. v.
Compagnie Des Bauxites de Guinee,
456 U.S. 694, 102 S. Ct. 2099 (1982).....3

International Shoe Co. v. State of Washington,
326 U.S. 310, 66 S. Ct. 154 (1945).....3

Kulko v. Superior Court of California,
436 U.S. 84, 98 S. Ct. 1690, reh. den.
438 U.S. 908, 98 S. Ct. 3127 (1978).....3

Pennoyer v. Neff,
95 U.S. 714 (1877).....3

Product Promotions v. Cousteau,
495 F.2d 483 (5th Cir. 1974).....2

Southern Pacific Transportation Co. v.
Commercial Metals, Co.,
456 U.S. 336, 102 S. Ct. 1815 (1982).....5

Worldwide Volkswagon Corp. v. Woodson,
444 U.S. 286, 100 S. Ct. 559 (1980).....3

Statutes

U.S. Sup. Ct. Rule 49.2, 28 U.S.C.A.....6

U.S. Sup. Ct. Rule 50.4, 28 U.S.C.A.....6

Vernon's Ann. Civ. St. art 2031b.....4

IN THE

Supreme Court of the United States

No. 83-1372

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR DAMAGES BY PAR INDUSTRIES, INC.

TO THE COURT:

This reply is filed on behalf of Par Industries, Inc. (Par), to the Petition for Writ of Certiorari of C & H Transportation Co., Inc. (C&H). The other respondent to this action is Jensen & Reynolds Construction Company (Jensen).

STATEMENT OF THE CASE

Par does not dispute the general facts. There is some disagreement between C&H and Jensen with regard to certain specific actions between them. For purposes of this reply, Par will accept the factual rendition of C&H, although Par does not acknowledge they are completely correct.

Par agrees with C&H's recitation of Par's actions, but disagrees with C&H's conclusions. Specifically, Par did load the equipment at its facility; however, Par was not the consignor.

ARGUMENT

This case presents the amazing spector of C&H continuing to allege that the Federal District Court for the Northern District of Texas has jurisdiction over Par, when the evidence shows Par (1) had *no* contacts with the forum state and, (2) had no contract with C&H. Rather than accept the holdings of the District Court and Court of Appeals, C&H presses its appeal to this Court, even though it has never cited one single statute, case, or authority in support of its position. Par submits this Petition for Writ of Certiorari is completely frivolous, with respect to Par, and requests this Court award Par damages for the expense and costs it has incurred in defending itself.

"The burden is on the Plaintiff to establish jurisdiction when challenged by the Defendant." *Familia De Boom v. Arosa Mercantile, S.A.*, 629 F.2d 1134, 1138 (5th Cir. 1980), citing *Product Promotions v. Cousteau*, 495 F.2d 483 (5th Cir. 1974). C&H ignored this burden with respect to establishing personal jurisdiction. It produced no evidence to support its pleading.

NO CONTACTS

Even as this Court has moved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877), to the more flexible approach of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945); it has never failed to require a demonstration that the non-resident defendant have "minimum contacts" with the forum state. *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099 (1982). Likewise, this Court has never hestitated to find a lack of personal jurisdiction when these "minimum contacts" are so slight that they offend a basic sense of fairness and reasonableness. *Kulko v. Superior Court of California*, 436 U.S. 84, 89 S. Ct. 1690, reh. den. 438 U.S. 908, 98 S. Ct. 3127 (1978). This general framework has been applied to a variety of factual situations. However, in virtually every instance, there has been some arguable basis for finding "minimum contacts".

This case presents a factual situation where C&H has failed to demonstrate any contacts with the forum state, at any time, by Par. In that respect, Par has a more valid claim than the defendant in *Worldwide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980). C&H failed to demonstrate even a "fortuitous circumstance" which would bring Par in contact with the forum state.

Both the District Court and Court of Appeals found C&H failed to establish Par had any contact with the forum state. C&H has never responded to these findings, but merely tries to assert that if the District Court has personal jurisdiction over Jensen, it should have personal jurisdiction over Par. No authority has ever been cited for this contention. In fact, stating the proposition refutes its validity. It was incumbent upon C&H to establish that the

Court had personal jurisdiction over Par, independent of its jurisdiction over Jensen. C&H failed to meet its burden and the granting of Par's Motion to Dismiss was proper and the ruling should be affirmed by this Court.

NO CONTRACT

Actually, C&H failed to meet its burden to establish personal jurisdiction at the stage prior to the consideration of "minimum contacts". C&H predicated jurisdiction in the District Court for the Northern District of Texas on the basis of the Texas long-arm statute (Vernon's Ann. Civ. St. art 2031b). In so doing, it relied upon § 4, and specifically the language in that section that deems a non-resident doing business in the state by entering into a contract with a Texas resident. (See Appendix C-3 to Petition for Writ of Certiorari.) However, C&H never demonstrated that Par entered into a contract with C&H. The District Court specifically found C&H never entered in to a contract in Texas with Par Industries. (Appendix B-2 to Petition for Writ of Certiorari.) On appeal, C&H did not challenge this finding and the Court of Appeals specifically held "(T)here is no record evidence that Par entered into a contract with C&H". (Appendix A-8 to Petition for Writ of Certiorari.) Thus, the District Court was completely correct in dismissing Par from this lawsuit, since C&H failed to satisfy the fundamental requirement of the Texas long-arm statute.

The only "evidence" C&H adduced was the conclusory allegation that it believed Par was the consignor. (Tr. 56) However, this assertion is completely refuted by the undisputed facts.

Par submits whether it was actually the consignor is not properly before the Court at this time. However, the

Court of Appeals did state in its decision that Par was the consignor, even though it found there was no contract between C&H and Par. Therefore, Par would request this Court reserve that determination and clarify the decision of the Court of Appeals.

The Court has recently recognized the consignor is the one with whom the contract of transportation is made. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S. Ct. 1815 (1982). Taking the evidence in the light most favorable to C&H, it is clear C&H did not believe Par was the consignor but knew Jensen was arranging and agreeing to pay for all of the transportation. Under C&H's version of the facts, Jensen contacted it to arrange the transportation. Jensen told C&H to pick the shipments up at the Par facility in New Iberia, Louisiana. Jensen told C&H to deliver the shipments to the Foss Alaska Lines facility in Seattle, Washington. Jensen told C&H to bill the freight charges to Manitou Equipment Corp. Lastly, C&H received partial payment of the charges from Jensen or some entity associated with Jensen. There is absolutely nothing in the record to indicate Par was a party to this transportation contract. This was the finding of both the District Court and Court of Appeals.

Par's own actions indicate it cannot be considered the consignor. When C&H came to its facilities to pick up these shipments for Jensen, Par insisted upon a receipt from C&H. Because Par wasn't a party to the transportation contract, it wouldn't be furnished with a copy of the bill of lading. C&H tries to chastise Par for not signing the non-recourse provision of the bill of lading as consignor. The answer to this should be obvious to C&H. Par could not sign the non-recourse provision because it was not the consignor. In order for an entity to relieve itself from

liability under a bill of lading contract, it is first necessary that that entity be a party to the contract.

Since Par was not a party to any contract with C&H, it cannot be brought into this suit under the Texas long-arm statute. Therefore, the granting of Par's Motion to Dismiss was proper and the ruling should be affirmed by this Court.

REQUEST FOR DAMAGES

In prosecuting this Petition for Writ of Certiorari, C&H has again failed to realize the basis for dismissing Par from the suit for lack of personal jurisdiction was entirely different from the basis applied to Jensen. Rather than address this difference, C&H continues to try to combine the two dismissals under the same standard. To this extent, the appeal of the portion of the decision concerning Par must be deemed frivolous and vexatious.

U.S. Sup. Ct. Rule 50.4, 28 U.S.C.A., prevents Par from having the expenses of printing its reply taxed against C&H. However, U.S. Sup. Ct. Rule 49.2, 28 U.S.C.A., allows this Court to award Par damages where the Petition for Writ of Certiorari is frivolous. Pursuant to this latter rule, Par requests this Court award it damages, expenses, and attorney's fees, in the amount of $2,500.00, which will help defray and offset the costs incurred by Par in defending a decision based on applicable legal principals which C&H has failed to comprehend.

CONCLUSION

Since the evidence indicates Par had no contact with the forum state and did not enter into any contract with C&H which would make it subject to the Texas long-arm statute, the District Court's decision granting Par's Motion to Dismiss for lack of personal jurisdiction must be affirmed. By failing to address the basis for the decision with respect to Par, C&H has filed a Petition for Writ of Certiorari which is completely frivolous and vexatious to Par; and, Par should be awarded damages against C&H.

Respectfully submitted,

Barry J. Brooks
Frank C. Brooks
BROOKS & BROOKS
8300 Douglas, Suite 800
Dallas, Texas 75225
(214) 373-9175
Attorneys for Respondent
Par Industries, Inc.

NO. 83-1372

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

C & H TRANSPORTATION CO., INC.,

Petitioner

VS.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,

Respondents

REQUEST FOR DAMAGES BY PAR INDUSTRIES, INC.

Barry J. Brooks
Frank C. Brooks
BROOKS & BROOKS
8300 Douglas, Suite 800
Dallas, Texas 75225
(214) 373-9175

Attorneys for Respondent
Par Industries, Inc.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 83-1372

C & H TRANSPORTATION CO., INC.,

Petitioner

VS.

JENSEN AND REYNOLDS CONSTRUCTION COMPANY AND PAR INDUSTRIES, INC.,

Respondents

REQUEST FOR DAMAGES BY PAR INDUSTRIES, INC.

TO THE COURT:

This reply is filed on behalf of Par Industries, Inc. (Par), to the Petition for Writ of Certiorari of C & H Transportation Co., Inc. (C&H). The other respondent to this action is Jensen & Reynolds Construction Company (Jensen).

In prosecuting this Petition for Writ of Certiorari, C&H has again failed to realize the basis for dismissing Par from the suit for lack of personal jurisdiction was entirely different from the basis applied to Jensen. Rather than address this difference, C&H continues to try to combine the two dismissals under the same standard. To this extent, the appeal of the portion of the decision concerning Par must be deemed frivolous and vexatious.

U. S. Sup. Ct. Rule 50.4, 28 U.S.C.A., prevents Par from having the expenses of printing its reply taxed against C&H. However, U. S. Sup. Ct. Rule 49.2, 28 U.S.C.A., allows this Court to award Par damages where the Petition for Writ of Certiorari is frivolous. Pursuant to this latter rule, Par requests this Court award it damages, expenses, and attorney's fees, in the amount of $2,500.00, which will help defray and offset the costs incurred by Par in defending a decision based on applicable legal principals which C&H has failed to comprehend.

Respectfully submitted,

Barry J. Brooks
Frank C. Brooks
BROOKS & BROOKS
8300 Douglas, Suite 800
Dallas, Texas 75225
(214) 373-9175

Attorneys for Respondent
Par Industries, Inc.

CERTIFICATE OF SERVICE

I certify a copy of this Request for Damages has been served upon Counsel for Petitioner, Mr. Ralph W. Pulley, Jr., 1200 Union Bank & Trust Tower, 5950 Berkshire Lane, Dallas, Texas, 75225, and Counsel for Respondent, Mr. David M. Taylor, 2001 Bryan Tower, Suite 1000, Dallas, Texas, 75201, by First Class Mail, postage prepaid, this 21st day of March, 1984.

Barry J. Brooks